

JUL 31 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

CATHY A. CATTERSON

U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARK COUNTY NATURAL
RESOURCES COUNCIL,

Plaintiff-Appellant,

v.

CLARK COUNTY, a Washington municipal
corporation,

Defendant-Appellee.

No. 02-35449

D.C. No. CV-01-05172-
FDB/ELM

MEMORANDUM*

Appeal from the United States District Court
for the Western District of Washington
Franklin D. Burgess, District Judge, Presiding

Argued and Submitted July 8, 2003
Seattle, Washington

Before: REAVLEY,** TASHIMA and PAEZ, Circuit Judges.

In its complaint, the Clark County Natural Resources Council identified

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9TH CIR. R. 36-3.

** The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

three dozen or so variances between the County's code, as revised, and the PSB Manual, each of which the Council contends violates the equivalency requirement of the County's discharge permit. Washington's Department of Ecology wrote that the revised code meets the requirements of the County's discharge permit. Ecology's one-page letter acknowledged that there were "differences" between the revised code and the PSB Manual but found that "these differences do not affect the 'equivalency' of the ordinances." The district court concluded that Ecology's interpretation of its own term--"equivalent to"--was entitled to "great deference," and therefore declined "to perform a meticulous review of [the County's] [c]ode revisions and compare them to the [PSB Manual]." The district court agreed with Ecology's equivalency determination but did not otherwise discuss its reasonableness.

We have previously held that a state agency's interpretation of a state-issued NPDES permit is entitled to "substantial deference."¹ However, Ecology's determination that the County's revised code is "equivalent to" the PSB Manual is entitled no deference if it is unreasonable. The reasonableness of Ecology's determination cannot be gauged without assessing the significance (if any) of the

¹ Russian R. Watershed Protection Comm. v. City of Santa Rosa, 142 F.3d 1136, 1141 (9th Cir. 1998).

variances between the revised code and the PSB Manual. We cannot determine whether the district court afforded the Council meaningful judicial review under the Clean Water Act's citizen suits provision² unless the record indicates that an inquiry into the reasonableness of Ecology's determination has been undertaken. This record does not reveal that Ecology articulated its reasons for finding that these variances do not undermine the equivalency of the revised code according to the standard of equivalency announced in Ecology's guidance manual, and there is no trace of explanation by the district court as to why the differences are insignificant. Consequently, we can neither determine whether the Council has been afforded meaningful judicial review nor can we assess the reasonableness of Ecology's equivalency determination. We therefore vacate the district court's award of summary judgment and remand for further proceedings.

VACATED and REMANDED.

² 33 U.S.C. § 1365(a)(1) (2001).